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Supreme Court of the United States.

OCTOBER TERM, 1940.

EVERETT WARE CADY, ET AL.,
PETITIONERS,

v.

CLIFFORD J. MURPHY,
RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

ISSUE PRESENTED TO THIS COURT.

The petitioners ask this Court to review a judgment of the Circuit Court of Appeals for the First Circuit, which court affirmed the judgment of the District Court of Maine, in which court a jury was waived. The jurisdiction of the Federal Courts is based on diversity of citizenship of the parties.

The petitioners have attempted to make it appear that a federal question of great importance is presented. In truth, the petitioners are asking this Court to review a finding of *fact* made by the District Court and affirmed by a majority of the judges of the Court of Appeals in a matter involving less than seven thousand ($7,000.00) dollars.

The petitioners state that, (Petition, page 2, lines 12 to 18):

> "The fundamental question presented is *whether a stock exchange firm which acts solely as broker for the purchaser of a security,* from whom by interstate telephone calls it has solicited an order to buy, *can be held liable as a seller of such security under Section 12(2) of the Securities Act for misrepresentation of fact regarding the security purchased.*"

The foregoing is *not* the question presented to this Court. It is only what the petitioners wish the issue was. The issue is not and never has been whether or not Section 12 (2) of the Securities Act applies to a *broker who acts solely for the purchaser.* The issue from the start has been and now is whether the Securities Act, upon the facts in this case, has enough teeth to hold the petitioners who have admittedly made false statements in soliciting an *offer* from the respondent to *buy* certain securities.

Findings of the District Court.

The District Court found *as a fact* that the petitioners acted *as agent for the seller* in the transaction in question, and solicited from the respondent not "an *order* to buy" but *"an offer to buy"* the stock in question which the petitioners' principal, E. E. Smith had for sale.

Peters, District Judge, in his opinion, Record page 291, last four lines from the bottom said:

> "The plaintiff has brought himself within the statute, Sections (12(2) and 2(3), and shown his right to recover by proving solicitation by the defendants' agent *of an offer* to buy the stock; his false material statements in regard to it, * * * *."

If the petitioners were acting solely as agent for the respondent, they would not be soliciting from their own principal an offer. They would be recommending a purchase but if the petitioners were acting (as they actually were) as agents or brokers for the owner of the security, they would be expected to do just what they did do, viz., solicit from the respondent an *offer* to buy.

On page 285, lines 22 to 25, Judge Peters further said:

> "From the somewhat conflicting evidence I consider the following facts established:
> The stock *sold to the plaintiff by the defendants,*—acting either as brokers or owners,—* * * *."

Judge Peters certainly does not say that the petitioners bought the stock as agents for the respondent. He certainly does not say that the petitioners were acting as agents for the respondent.

On page 286, lines 7 to 9, Judge Peters further said:

> "At this point it is enough to say that in numerous telephone conversations between Boston and Portland, Lynch, for his firm, solicited from the plaintiff an *offer to buy* the stock mentioned."

Certainly this quotation from the Court's opinion does not indicate that Judge Peters found that the petitioners were acting as agents for the respondent.

On page 291, lines 16 to 20, Judge Peters further said:

> "It should be noted that the statute, which applies only to interstate communications, relieves the purchaser from the common law obligation of using reasonable prudence himself and puts the burden on the *seller* to prove that he did not know and could not reasonably have known that his material statements were false."

In this paragraph Judge Peters refers to the petitioners as the "seller". Certainly, if in the opinion of the District Court the petitioners were acting solely as agents for the buyer, they would not be referred to as the *"seller"*.

Nowhere in the printed Record is there a word or a phrase that justifies the petitioners' statement that the petitioners were acting solely as the agents of the respondent. It is clear fabrication by the petitioners contrary both to the findings of the District Court, the findings of the Court of Appeals, and the record in the case.

On Lynch's (petitioners' head trader) own evidence, the District Court could not possibly draw the conclusion that the petitioners acted solely as agents of the respondent. The evidence shows that late in the afternoon of March 1, 1937, E. E. Smith of New York, who the petitioners claim was the owner of the stock, called Lynch, the petitioners' head trader, on the telephone and told him that he (Smith) had *1970*

shares of South American Utilities stock which he wanted to sell, *and asked Lynch if he could find a customer for him.* Following this conversation, Lynch called the respondent (Murphy) on the telephone *and solicited from him* not *an order* but *an offer* to buy. The respondent did not order the stock from Lynch, he simply made an offer to buy 1700 of the 1970 shares. The balance Lynch sold to other customers or bought it for his own company's account.

It was stipulated that all this was done by means of *one* telephone conversation (Record page 281). Certainly the petitioners were acting as agent for the seller in regard to the 270 shares, as the respondent had nothing to do with them, and if the whole transaction was handled in *one telephone conversation,* certainly the petitioners were acting for Smith in the entire transaction.

In the petitioners' supporting brief, page 26, lines 24 to 27, the petitioners say:

> "The evidence will support no other conclusion than that the petitioners were brokers who, *after* recommending the purchase of the shares in question, accepted and executed the respondent's order for the purchase of the shares."

The petitioners' contention apparently is that after they had misled the respondent by their false and fraudulent statements regarding the stock, as a part of their scheme they got the respondent to consent that they should act as his agents in the purchase. Thus on the petitioners' own statements during the time of solicitation of the offer for the stock, the petitioners were not the agents of the respondent but were merely asking to be employed as agents, then after they had completed their scheme and the purchaser had relied upon their representations, they became his agent to complete the purchase. What an easy means this would be for the petitioners, or anyone in their same position, to escape the effects of the Act. It was all a part of their fraudulent scheme, and at no time did they represent the respondent.

The petitioners realize that there is no justification for this petition if they were the owner or agents for the owner of the stock, or were even acting in a dual capacity as broker for both parties, but they fail to point out in their petition or supporting brief anything in the record or in the opinion of the District Court, or in the opinion of the Court of Appeals, that justifies their bold and completely unwarranted statement that the petitioners acted solely as agents for the respondent.

Findings by the Circuit Court of Appeals.

The petitioners say, Petition, page 2, lines 19 to 24:

> "There is likewise presented the question of practice whether, under the Rules of Civil Procedure, upon an appeal in a law action tried without a jury, it is competent for the Circuit Court of Appeals itself to make a finding of fact not made by the District Judge and decide the case upon the basis of that finding."

The Circuit Court of Appeals did not make a finding of fact on which its decision was based.

What the Court of Appeals actually said and what the petitioners rely on as an excuse to get this Court to pass on a question of fact will be found in *113 Fed. 2d,* 991, lines 39 to 54, where the Court of Appeals said:

> "At one point in its opinion, the Court below makes a statement of law which is broader than necessary to support the judgment rendered. It says (30 Fed. Supp. 466, 469):
> 'Whether the seller, being a broker, himself owns the security, or whether he is acting as the agent for the owner, or for the purchaser, or for both, is immaterial. If, in the course of an attempt to dispose of, or solicitation of an offer to buy a security, he makes false statements under circumstances referred to in Section 12, the purchaser is given a right of action to recover any damages he has suffered on account of the false representations.' "

The Court of Appeals further said on the same page (p. 991), lines 55 to 65:

> "We need not decide whether Section 12(2) applies to the case *of a broker acting solely for a purchaser, where the broker makes misrepresentations in the course of soliciting from the purchaser an order to buy.* Even if the version of the defendants' witness Lynch is accepted, Rhoades & Company was acting either as agent for the seller or in a dual capacity as agent for both parties, in either of which cases Section 12(2) is applicable." (italics ours)

The Court of Appeals simply and clearly said that it was not necessary for it to decide whether or not the statute applies to a broker, *who acts solely as agent for the buyer,* because Judge Peters had found that the broker acted as agent for the seller. But, said the Court of Appeals, even if the petitioners' version is to be believed, which it was not by the District Court, the petitioners were certainly acting either as agents for the seller or in a dual capacity, and in either event they are subject to the terms of the statute.

The Court of Appeals did not make findings of fact that were not found by the District Court. The most the Court of Appeals did was to review the special findings made by the District Court and said, that after viewing the evidence in a light most favorable to the petitioners, the petitioners were acting at least in a dual capacity and under such circumstances the Act applies.

The cases cited by the petitioners in their brief, pages 16-26, are not in point. These cases all hold that the Court of Appeals will not reverse the findings of the lower court unless such findings are clearly erroneous. With this we agree, but that is not the situation here. On the petitioners' own statement, the Court of Appeals has not reversed or changed the findings of the District Court,—it has only made findings which the petitioners say the District Court failed to make.

It is the duty of the Court of Appeals to uphold the judgment of the District Court if there is any evidence in the record to justify its doing so, and in this case, the Court of

Appeals found that after viewing the evidence in a light most favorable to the petitioners, the petitioners were acting at least in a dual capacity.

The respondent at all times has contended and now contends that the petitioners were either the owners of the security, or the agents for the owners of the security, at the time they made false representations to the respondent regarding the stock, and we further contend that the District Court so found. If, however, the District Court did not so find, it was the duty of the Court of Appeals to examine the record and to sustain the judgment of the District Court if there is evidence in the record to justify this, and the Court found that there was.

In *Helvering* v. *Gowran,* 302 U. S. (1927) 238, at page 245, the Supreme Court said:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. * * * *"

In *Migeon* v. *Montana Cent. Ry. Co.,* 77 Fed. 249, at page 253, the Court of Appeals for the Ninth Circuit said:

> "We shall not stop to inquire whether any of the reasons expressed by the court were irrelevant or erroneous. The point to be decided is whether the conclusions arrived at are sustained by the evidence and the law. *Sullivan* v. *Mining Co.,* 143 U. S. 431, 12 Sup. Ct. 555."

And in *Sullivan* v. *Iron Silver Mining Co.,* 143 U. S. 431, at page 434, the Supreme Court said:

> "But, notwithstanding the technical error in this ruling, we cannot see that it wrought any prejudice to the substantial rights of the plaintiff in error, for, upon all the facts in the case, the judgment was one which must necessarily have been rendered. * * * *"

APPLICATION OF ACT.

The judge of the District Court and all three judges of the Court of Appeals held that the Act was applicable if the petitioners were the owners of the stock or the agents for the owner, when they *solicited the offer* or if they were acting in a dual capacity.

The petitioners recognize the correctness of this ruling and attempt to avoid its effects by misconstruing the findings of the two lower courts.

The District Court has found as a fact that the petitioners *solicited an offer* for the stock from the respondent. *That during their solicitations, they made false statements of a material nature regarding the stock.*

Peters, J., Record page 291, last four lines:

> "The plaintiff has brought himself within the statute, Sections 12(2) and 2(3) and *shown his right to recover by proving solicitation by the defendants' agent of an offer to buy the stock; his false material statements in regard to it,* * * * *" (italics ours)

The material part of Section 12 of the Act reads as follows:

> "Any person who sells a security * * * by the use of any means * * * in interstate commerce * * * by means of a prospectus or *oral communication* which includes an *untrue statement* of a material fact * * * shall be liable * * * * *." (italics ours)

Section 2(3) of the Act defines the word "sell" as it is to be used in the Act:

> "The term 'sale', 'sell', 'offer to sell', or 'offer for sale', shall include every contract of sale or disposition of, attempt or offer to dispose of, *or solicitation of an offer to buy,* a security or interest in a security for value; * * * *" (italics ours)

Judge Peters has specifically found facts which bring the case within the statute, that is Judge Peters has found that the petitioners *solicited an offer from the respondent to buy the stock;* that during the solicitation, the petitioners made false representations of a material nature regarding the

quality of the stock which induced the respondent to buy. These findings of fact were affirmed by the majority of the Court of Appeals and on these facts both the District Court and the judges of the Court of Appeals said the Act applies, therefore the only way this Court could reverse the findings of the lower courts would be either to disagree with the findings of fact made by the lower courts, and find, as the petitioners desire, that the petitioners acted solely as agents for the buyer in the transaction, or this Court must find as a matter of law that the Act does not apply if the petitioners were acting as agents for the seller.

Burden on Broker.

The petitioners finally urge as a reason why this petition should be granted, that the law as now drafted and interpreted by the lower courts imposes a heavy risk on a broker in the ordinary brokerage business.

This same argument was made in the District Court and in the Court of Appeals.

Judge Peters found as a fact that the petitioners' agent in his zeal to sell the stock made false representations of a material nature regarding the stock, and the innocent respondent, relying on these false statements, parted with a substantial part of his capital.

Peters, J., in his opinion, Record page 291, last four lines from the bottom said:

> "The plaintiff has brought himself within the statute, Sections 12(2) and 2(3) and *shown his right to recover by proving solicitation by the defendants' agent of an offer to buy the stock; his false material statements in regard to it.* * * * *" (italics ours)

The falsity of the statements made by the petitioners in their efforts to make a sale was so clearly proven, that the petitioners do not in this Court and did not in the Court of Appeals question Judge Peters' finding on this point.

Petition, page 5, lines 1 to 4.

The only burden the Securities Act places on anyone is *to tell the truth* and *all the truth* when selling stock, and anyone that does not do so in any business is entitled to very little sympathy.

In effect the petitioners say,—we admit that we made false statements to you regarding the stock which induced you to invest your capital, but what of it? We are not liable under the common law because you were negligent in believing us, and we hope we can escape liability under the statute by a technicality.

Certainly, it takes courage on the part of the petitioners to ask this Court for sympathy.

Judge Peters pointed out in his opinion that the Act does not apply to the ordinary brokerage transaction, *merely the execution by the broker of orders given him by the buyer,* but the Court decided it applies only to the *extra-solicitation during which the broker makes false statements regarding the security.*

Peters, J., page 291, lines 28 to 32:

> "The ordinary brokerage transaction, merely the execution of orders to buy or sell, does not appear to be affected by Section 12. It is the extra-brokerage activity,—solicitations accompanied by false statements,—which are made the basis for a cause of action if damage is caused thereby."

Cases relied on by Petitioners.

In the petitioner's brief, emphasis is placed upon *Gill* v. *Hornblower,* 294 Mass. 26, and similar cases, as supporting the contention of the petitioners. The respondent in no way disagrees with the law of *Gill* v. *Hornblower* but wishes to point out that the facts of that case are in no way analogous to the case now under consideration.

In that case, the court said, page . . :

> "On December 7, 1931, the plaintiff testatrix *went to the office of the defendants,* who were stock brokers in Boston, and

> gave them an order to buy for her five hundred shares of the common stock without par value of Electric Bond and Share Company. * * * * *The defendants were in no way interested in promoting the sale of the stock."* (italics ours)

The facts of *Gill* v. *Hornblower,* as quoted above, are to be contrasted with the language of the District Court in the present case where it said, Record page 291:

> "The plaintiff has brought himself within the statute, Section 12(2) and 2(3) and shown his right to recover *by proving solicitation by the defendants' agent of an offer to buy the stock."*

In this case the respondent did not call the petitioners, the petitioners solicited the respondent.

We respectfully submit that there is no question raised in the petition which this Court should undertake to review.

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